IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. _____

Supreme Court, U. S.
FILED
APR 12 1977
MICHAEL RODAK, JR., CLERK

WILLIAM R. GALLAGHER,

76-1405

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second

Circuit, by a judgment entered the 14th day of March, 1977, affirmed a judgment in the United States District Court, Eastern District of New York, convicting petitioner of one count of possessing property stolen from interstate shipment in violation of Title 18 United States Code, Section 659, upon his plea of guilty before Hon. Edward R. Neaher.

The conviction was unanimously affirmed without opinion.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on March 4, 1977 as aforesaid. A copy is reproduced as Appendix A to this petition.

C.

THE QUESTION PRESENTED FOR REVIEW

1. Does the deliberate execution of a search warrant at 11:30 P.M. in violation of its daytime only authorization require suppression under Federal Rules of Criminal Procedure 41 (c) and the Fourth Amendment of the Constitution of the United States?

D.

STATUTES INVOLVED

The statutes involved are Federal Rules of Criminal Procedure, Rules 41 (c) and (h) and

United States Constitution, Amendment IV. Each of the foregoing is set forth in Appendix B of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Preliminary Statement

Petitioner, WILLIAM R. GALLAGHER, appealed from a judgment of the United States District Court for the Eastern District of New York (Hon. Edward R. Neaher, United States District Judge) entered on December 3, 1976, convicting him upon his plea of guilty to one count possessing property stolen from interstate shipment (Title 18 United States Code, Section 659) and sentencing him to a term of imprisonment of two years (the defendant to serve the first six months with the balance of eighteen months suspended).

Petitioner's guilty plea followed the denial of his motion to suppress physical evidence after a hearing was held before Neaher, J. on June 10, 1976. It was stipulated between the government and the defense with the approval of the District Court that the appellant would be permitted to take this appeal from the denial of suppression and remain free on bail pending the appeal to the United States Court of Appeals for the Second Circuit

2. Evidence Adduced at the Suppression Hearing

On January 28, 1976, at approximately 1:30 P.M. Special Agent John E. Westhoff of the F.B.I. obtained a search warrant for premises described as "the first floor left" of 1576 East 98th Street

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a premises which was further described as "a 4 family, two-story dwelling with red brick veneer and two (2) underground garages".

Westhoff took the warrant, which specified a daytime search and upon which the night service clause had been stricken by the Magistrate to the premises. Arriving there at approximately 3:00 P.M., he knocked on the front door and rang the bell. Receiving no response, he joined other agents already present in a continuing surveillance of the premises.

At approximately 11:15 P.M., petitioner, William Gallagher, entered the premises. Fifteen minutes later, Westhoff rang a bell and Gallagher came to one of the upstairs windows and looked out. Westhoff identified himself and said he had a warrant. Gallagher came downstairs and opened the front door. The agents went upstairs to the first floor apartment and began to search it.

The first floor apartment was a complete residential unit occupied by the Gallagher family. Westhoff and his fellow officers (another F.B.I. agent and two Port Authority Police Officers) searched in every room of the house, including the children's bedroom, kitchen and bathroom. They opened up drawer, closets, kitchen cabinets and the refrigerator. When the agents did not find what they were looking for in the Gallagher family's first floor apartment, they asked Mr. Gallagher for the key to the downstairs ground floor apartment, which he stated he did not have. They thereupon took Mr. Gallagher downstairs with them and demanded the key. Gallagher again stated that he did not have a key, and the agents proceeded to break down the door to that apartment. Inside, in the bathroom and kitchen, the agens found the stolen "Russ Togs" women's wear which is the subject matter of the instant indictment.

Westhoff then made a telephone call and about an hour later additional agents arrived to continue the search and remove the items.

3. The decision of the District Court.

At the conclusion of the hearing, Judge Neaher denied the motion to suppress. His opinion, which was read into the record at the close of the hearing, is set forth as Appendix D to this petition.

F.

THE BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdicition of the United States District Court for the Eastern District of New York was invoked upon the grounds that the crime charged was a violation of Federal Law, to wit, 18 U.S.C. §659.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

POINT

THE DELIBERATE EXECUTION OF A SEARCH WARRANT AT 11:30 P.M. IN VIOLATION OF ITS DAY-TIME ONLY AUTHORIZATION REQUIRED SUPPRESSION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 41 (c) AND THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

There is no factual dispute in the instant case that the government agents knowingly and deliberately executed a daytime-only search warrant at 11:30 P.M. Petitioner contends that this violation of the Federal Rules of Criminal Procedure was of constitutional magnitude.

A general search warrant, which is governed by Rule 41 of the Federal Rules of Criminal Procedure, cannot be executed after 10:00 P.M. without a specific authorization to do so contained in the warrant and a special showing in the supporting affidavits justifying a "highttime" search.

> Rule 41 (c) provides that a search warrant
> "***shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause show, authorizes its execution at times other than daytime. ***"

Rule 41 (h) defines "daytime" as "the hours from 6:00 A.M. to 10:00 P.M. local time".

The foregoing provisions appear in the rules as the result of a 1972 Amendment. Prior to 1972

Rule 41 (c) contained no definition of "daytime", while it provided

> "***The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. ***"

The Notes of the Advisory Committee on Rules explain the amendment thusly:

> "The rule is also changed to allow the magistrate to authorize a search at a time other than 'daytime', where there is 'reasonable cause show' for doing so. To make clear what 'daytime' means, the term is defined in subdivision (h)".

In Gooding v. United States, 416 U.S. 430 (1974) the Court compared 21 U.S.C. 879 (a)[1], which governs search warrants in narcotics cases, to the amended Rule 41 (c) and concluded that narcotics warrants do not require a special showing for the necessity of a nighttime search while the clear intent of Rule 41 (c) is to require such a showing. Said the Court, (at P. 456):

> "Federal Rule Crim Proc. 41, as amended in 1972, states: 'The warrant shall be served in the daytime unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime'.

1. This subsection provides as follows:
"A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable caus to believe that grounds exist for the warrant and for its service at such time." -7-

"(Emphasis added.) The fact that Congress, when it has intended to require such special showing for nighttime searches, has done so in language largely free from ambiguity militates against petitioner's assertion that the language of [21 U. S. C.] §879 (a) on its face supports his position."
[Emphasis in original.]

The majority as well as the three dissenting Justices in Gooding, all recognized the additional invasion of privacy that a nighttime search represents. This recognition was expounded upon by the dissenters, per Douglas, J., who would have also interpreted the narcotics search statute to require a special showing for nighttime searches similar to that which all of the Justices agreed is required by Rule 41 (c):

" This Court has consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search. Mr. Justice Harlan observed in holding a nighttime search unconstitutional in Jones v. United States, 357 U.S. 493, 498, (1958) [I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home. 'In Collidge v. New Hampshire, 403 U.S. 443, 477 (1971), the Court again recognized that a midnight entry into a home was an'extremely serious intrusion'. And our decision in Griswold v. Connecticut, 381 U.S. 497 (1965), was

"In large part based upon our revulsion at the thought of nighttime searches of the marital bedroom to discover evidence of illegal contraceptive use. See id., at 485-486.

"It is small wonder, then that Congress has consistently required more stringent justification for nighttime searches than that needed to authorize a search during the day."
(414 U.S. at p. 463).

The Second Circuit expressed its accord with the foregoing view in United States v. Ravich, 421, Fed. 1196, 1201 (2d Cir. 1970):

"The reason for requiring specific authorization for night searches and for the somewhat higher standard of proof for them imposed by Rule 41 [is] the peculiar abrasiveness of official intrusions at such periods, see Junes v. United States [supra]."

It is therefore, clear beyond cavil that the framers of the amended Rule 41 (c) intended to permit searches after 10:00 P.M. only with the approbation of the Magistrate and only upon a showing of necessity for the greater intrusion of a nighttime search. The officers executing the warrant are simply not given the discretion to execute a search warrant at night of their own initiative.

The warrant in the instant case concededly failed to contain the requisite specific authorization for service after 10:00 P.M. In fact such authorization on the standard warrant form was affirmatively "x"ed out in this case. This fact alone, we submit,

invalidates the instant search in violation of the warrant's provisions.

Furthermore, the supporting affidavit failed to con tain any showing necessitating the greater intrusion of a nighttime search. There was no showing, for example, that the warrant could not have been executed during the daytime hours, or that the property sought was likely to be removed or destroyed, or that the property sought was not likely to be found in the premises except at night.[2] Nor is it possible to conclude from the supporting affidavit that "the search [was] calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality" such as the packaging of narcotics. See, United States v. Gooding, 477 F. 2d 428 (D.C. Cir. 1973) [Robinson, J., concurring], affd., Gooding v. United States, supra. Nor was there any proof of the foregoing adduced at the hearing.

Research has failed to disclose any case in which evidence obtained during a nighttime search in derogation of the new, specific 10:00 P.M. deadline in Rule 41 was sought to be introduced. Numerous cases have, however, arisen under the former rule in which "daytime" warrants were alleged to have been executed at night. While interpretations of what constituted the end of "daytime" have varied from precisely at sunset to the time of actual darkness, nighttime execution of a daytime warrant has consistently resulted in suppression. See Anno., Propriety of Execution of Search Warrant at Nighttime, 26 A,L.R. 3d 951. Also, see e.g.

2. Such are the criteria codified in the District of Columbia statutes (D.C. Code 23-522 [c][1] cited by the Court in Gooding v. United States, supra, 416 U.S. 430, 434 n. 4.

United States ex rel. Boyance v. Meyers, 398, F. 2d 896 (3d Cir. 1968); Pugliese v. United States, 343 f. 2d 837(1st Cir. 1965); United States v. Gosser, 339 F. 2d 102 (6th Cir. 1964); cert. denied, 382 U.S. 819; United States v. Woodson, 303 F. 2d 49 (6th Cir. 1964) cert. denied, 373 U.S. 941; United States v. Merritt, 293 F. 2d 742 (3d Cir. 1961).

Counsel is aware of no case in which the nighttime execution of a daytime warrant at occupied premises has been held either harmless or justified. In one case United States v. Ravich, supra, 421 F. 2d 1196, the Second Circuit did hold that the search of two unoccupied motel rooms at night without nighttime authorization in the warrant was harmless under Federal Rule Cr. p. 52 (a). But in that case the omission of nighttime authorization was held to be inadvertent (See United States v. Burke, 517 F. 2d 377 386 [2d Cir. 1975]. The defendants had already been arrested and taken from the rooms during the day and the search was for some items which had already been seen by the arresting agents. Also, the Court found that the issuing judge was aware that the warrants would be executed at night and found further that the warrants contained an adequate factual basis for a nighttime search. Moreover, the facts in Ravich occurred in 1968, prior to the amendment to Rule 41 (c) discussed above. To say that the instant case is materially distinguishable from Ravich is an understatement.

It is also impossible for the Government to seriously contend that the service of the warrant an hour and a half later than the 10:00 P.M. limit and the presence of numerous officers executing it until the early morning hours adds up to a "ministerial" defect. We maintain it was a serious violation of constitutional magnitude.

Neverthe less, the Government will contend, as the District Court concluded, that the violation of Rule 41 (c) was harmless in the instant case because nobody else in the Gallagher household was at home when the search occurred, and Mr. Gallagher himself had arrived home fifteen minutes earlier and hence nobody was "rousted" out of bed. The Government may also contend, as it did in the Court below, that the agents showed "good faith" in not executing the warrant until Mr. Gallagher arrived home.

To the "good faith" argument, we note our doubts that the agents could have properly executed the warrant by breaking and entering the Gallagher's apartment inasmuch as they were aware that nobody in the family was home at the time and were not "refused admittance" (18 U.S.C. §3109). (But see United States v. Gervato, 474 F. 2d [3d Cir. 1973]). In any event, the other side of the "good faith" coin is the agent's hope of strengthening the Government's case by finding the defendant in closer proximity to the contraband, or the garnering of admission or additional physical evidence from the defendant or the avoidance of defenses which could arise from the non-presence of the defendant at the time of the search. Executing the warrant at the time they did also obviated the necessity of maintaining surveillance until the "daytime" hours arrived. Judging from the wily and oft-times evasive testimony of Agent Westhoff at the suppression hearing, we think it fair to conclude that "good faith" was not at the top of his list of prioirties in executing the instant warrant.

The argument that the intrusion was minimal because of the lack of other family members present (Mr. Gallagher has a wife and five children residing with him at the premises searched) is merely to state that this search was less abrasive than it could have

been had they been home and in their beds when the warrant was executed. But any nighttime search of a home - especially one which lasts into the morning hours, as was the case here - is still abrasive per se no matter how many family members are home when the search begins and whether they are awake or abed, dressed or not. To repeat, we are not aware of any case which qualifies the notion of the particular abrasiveness of nighttime searches with considerations of whether the occupants are acutally asleep at the time, and we submit that the requirement of specific justification and authorization for nighttime searches is of constitutional magnitude.

The court below placed primary reliance for its "harmless error" approached on the Second Circuit's opinion in United States v. Burke, supra, 517 F. 2d 377. This reliance was mismplaced. In Burke, appellant contended that the search warrant, issued by a state judge in Connecticut on a Connecticut from (but determined to be a "federal warrant" because it was sought for a particular federal offense by a federal law enforcement officer although together with state officers [517 F. 2d supra, at p. 384]) failed to conform to the requirements of Rule 41 (c) in three respects: 1. the warrant had been directed to "any Police Officer" rather than to a "civil officer of the United States", 2. the warrant commanded a search "within a reasonable time" rather than "within a specific time not to exceed ten days", 3. the warrant was made returnable before the issuing judge rather than a federal magistrate.

The Second Circuit, in holding that these violations of Rule 41 were not of sufficient consequence to justify suppression, cited the provisions of the American Law Institute's Model Code of Pre-Arraignment Procedure and noted that like defects were

not grounds for suppression under the Model Code (577 F. 2d supra at p. 386). In a footnote to the opinion, however, the Court indicated that an "important exception" to the Model Code's "harmless error" scheme was "execution of the warrant at a time not authorized therein or at nighttime" (emphasis added)(517 F. 2d, supra, at p. 386 n. 11).

In addition to this most isgnificant footnote the Second Circuit went on to state that "violations of Rule 41 alone should not lead to exclusion unless; 1. there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or 2. that there is evidence of intentional and deliberate disregard of a provision of the Rule" [footnote omitted] (517 F. 2d, supra, at p. 386-7). It is clear in the instant case that the nighttime search was intentionally and deliberately in violation of the provisions of the Rule and of the specific provisions of the warrant, and that it was more abrasive than had it been carried out in the daytime.

We submit that there has been a knowing and clear cut violation of the Fourth Amendment, and suppression is required.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND JUDGMENT BELOW REVERSED

Respectfully submitted,

EVSEROFF & SONENSHINE,
Attorneys for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF
APPEALS FOR THE SECOND
CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of March, one thousand nine hundred and seventy-seven.

Present: Hon. Wilfred Feinberg

Hon. William H. Timbers
Circuit Judges

Hon. Oscar H. Davis

Judge, U.S. Court of Claims
Sitting by designation

United States of America,

Plaintiff-Appellee

v. 76-1588

William Richard Gallagher,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed t that the judgment of said District Court be and is hereby is affirmed.

A. DANIEL FUSARO
Clerk

By. Arthur Heller
Deputy Clerk

APPENDIX B

Federal Rules of Criminal Procedure

Rule 41. Search and Seizure

x x x

(c) Issuance and Contents

x x x

(h) Scope and Definitions

United States Constitution,
Amendment IV

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search within a specified period of time not to exceed 10 days, the person or place named for the property sepcified. The warrant shall be served in the daytime, unless the issuing authority by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

x x x

(h). Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers, and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m., according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

APPENDIX "C"

UNITED STATES DISTRICT COURT
For The

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

Docket No.

Premises known as 1576 East 98th Street, Brooklyn, New York, the 1st floor left of a 4 family, two-story dwelling with red brick veneer and two (2) underground garages,

Case No.
SEARCH
WARRANT

Defendant.

To: ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION:

Affidavit (s) having been made before me by MICHAEL R. RIGOLIZZO, Special Agent of the Federal Bureau of Investigation

that he has reason to believe that ~~on the person of~~ on the premises known as 1576 East 98th Street, Brooklyn, New Yor, the lst floor left of a 4 family, two-story dwelling with red brick veneer and two (2) underground garages, in the Eastern District of New York there is now being concealed certain property, namely an unknown quantity of merchandise which was stolen while moving as and constituted part of foreign and interstate shipments of freight, including but not limiting to various types of wearing apparel and jewelry in violation of Title 18, United States Code Section 659., and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit (s)

You are hereby commanded to search within a period of ----------(not to exceed 10 days) the person or place named for the property specified, serving this earrant and making the search (~~in the daytime of the day or night~~) (in the daytime (6:00 a. m. to 10: p. m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before _____ as required by law.
federal judge or magistrate

Dated this day of

1977.

Judge (Federal or State Court of Record) or Federal Magistrate.

APPENDIX "D"

DECISION OF THE HEARING COURT

" I am going to uphold this warrant for the following reasons: I am satisfied from what was said in the United States against Burke case, 517 F 2nd, 387, that a District Court should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude. In my opinion, the failure, or I should say the inability of the agent to serve this warrant before 10 p. m. is satisfactorily excused by the circumstances which have been made apparently through the hearing here this afternoon. This was certainly not a case one would apply the two standards of the Burke case, where I can find any prejudice in the sense that the search might not have occurred or would not have been so abrasive if the rule of service before 10 p. m. had been followed; or two, there was any evidence of an intentional disregard of the provisions vis a vis provisions in the rule. " In my opinion, based on the information available here of agents waiting outside from at least the time the warrant arrived sometime in the afternoon, 3 o'clock until 10 p. m., it's true they could have pulled up their tents and gone home or had somebody wait one more hour outside the house waiting for someone who resided in the apartment to arrive. It was stipulated he was the sole occupant at the time. We cannot regard this intrusion made within five to fifteen minutes after he entered the house as an abrasive invasion of people asleep in bed in the middle of the night.

" So I can't find, as I say, that this would not have been as abrasive search. I cannot find that it would have been an abrasive search under the circumstances or what I will regard as a repulsive intrusion of privacy in the middle of the night.

" On the basis of the evidence here, although as a matter of defense you may be able to convince a jury at a trial that this was some separate apartment rented by someone else, in the light of the information provided by a co-defendant, Sallone, as to whom he was bringing the goods that he was caught with, the identity of that person, and what his past relationship with that person was, that is the defendant Gallagher, I don't think in my opinion anyone can claim there was any mistaken identity as to whose room that was under the very apartment in which Gallagher lived. In view of the fact it was Mr. Gallagher, and to corroborate the fact he had provided the telephone number of the phone that didn't have a number on it, and secondly, a slip of paper bearing Mr. Gallagher's name-- a receipt of some kind -- was in one of the coats in the so-called bathroom, which I regard is inditia of his connection with that area-- and under the circumstances I'm going to find the warrant to have been validly executed in all respects."